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Damages from Slip and Fall Injuries

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IN THE EARLIER SLIP AND FALL CASES a plaintiff who had assumed the risk could not recover from a defendant who had been negligent in permitting a dangerous condition to exist,[1] because of the doctrines *volenti non fit injuria*[2] and assumption of risk.[3] In most jurisdictions contributory negligence[4] bars recovery, but in a few states it only diminishes the damages.[5] Therefore, if the plaintiff acts unreasonably in encountering a known risk his conduct amounts to contributory negligence and he is barred from recovery for two reasons: (1) He has impliedly consented to take a chance; (2) The policy of the law is to deny recovery for a loss for which the plaintiff was at least partially responsible. Juries seemed suspicious of injuries in the early cases, and verdicts were usually small.

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[1] Westborough County Club v. Palmer, 204 F. 2d 143 (8th Cir. 1953); Schmidt v. Fontaine Ferry Enterprises, 319 S.W. 2d 468 (Ky. Ct. App. 1958); Strand Enterprises, Inc., v. Turner, 223 Miss. 588, 78 S. 2d 769 (1955); Landrum v. Roddy, 143 Neb. 934, 12 N.W. 2d 82 (1943).

[2] "No legal wrong is done to one who consents." 44 Words and Phrases 599 (1962). Generally, one who voluntarily places himself in a situation whereby he suffers an injury will not be heard to say that his damage is due to nuisance maintained by another, the principle being expressed by the maxim *volenti non-fit injuria.* Oetjen v. Goff Kirby Co., 38 Ohio L. Abs. 117, 49 N.E. 2d 95 (1942).

[3] Distinction between doctrine of *assumption of risk* and the maxim *volenti non fit injuria* is that the former applies to cases involving contractual relationship, while latter applies without regard to any contractual relationship, but the general theory underlying both is the same. Bailey v. Safeway Stores, Inc., 55 Wash. 2d 728, 349 P. 2d 1077 (1960).

[4] Contributory negligence involves some fault or breach of duty on the part of the injured person or his failure to use required degree of care for his safety. Whereas, assumption of risk doctrine or *volenti non-fit injuria* maxim may bar recovery of damages for injuries sustained though injured person was free from contributory negligence. Kirby Lumber Co. v. Murphy, 271 S.W. 2d 672 (Tex. Civ. App. 1954).

[5] For example, under § 1454 of the Mississippi Code it is provided: "In all actions hereafter brought for personal injuries, or where such injuries have resulted in death or injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property or the person having control over the property." As a practical proposition when the defense attorney argues contributory negligence, in the closing argument the plaintiff's attorney usually says, "They contend this poor lady was guilty of contributory negligence. Thereby they admit their own negligence and if she was 50% negligent, just reduce our $40,000.00 suit to half and return a verdict for $20,000.00 under this instruction of the court and the defendant's admission to their negligence."

In these cases both assumption of risk and contributory negligence can be used as defenses and where the theories overlap the name given the defense makes little difference.[6]

The doctrine of assumption of risk as applied to icy sidewalks and store entrances contain the following elements: (1) Knowledge and appreciation of the danger, (2) The existence of a reasonable alternative route; (3) A voluntary election to encounter danger.[7]

As early as 1950, the courts held that where a lady observed the snowy conditions but did not see the rut into which she fell because it was completely covered with snow, she did not assume the risk as she could not have known of the dangerous condition. Where defendant's negligence contributed to the dangerous condition, the courts uniformly held the defendants liable. Thus, where a defective downspout on the defendant's building caused water to pour onto the sidewalk resulting in a patch of ice, and the plaintiff testified that she realized that anyone who walked on an icy area was in danger of falling, but that, at the time, she had not thought of the possibility of falling, the Minnesota Supreme Court affirmed the lower court's ruling that the issue of assumption or risk was rightly left to the jury.[8] Likewise, these defenses apply to wet and allegedly slippery concrete.[9] In a recent Iowa case[10] there is an excellent discussion of assumption of risk to open and obvious defects. A 54 year old plaintiff slipped and fell on a patch of ice in a shopping center parking lot, while attempting to aid two ladies, who had fallen. Defendant claimed the existence of ice was an open and obvious defect, for which defendant was under no duty to plaintiff, a business invitee, to give warning. Plaintiff testified he did not realize the existence of the ice until a moment before the fall, because several inches of dirty snow

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[6] Compare contributory negligence cases of Tosty v. Morgan Co., 151 Wis. 601, 139 N.W. 402 (1913); Poole v. Lutz and Schmidt, Inc., 273 Ky. 586, 117 S.W. 575 (1938); Wright v. City of St. Cloud, 54 Minn. 94, 55 N.W. 819 (1893). Assumption of risk cases: Howey v. Fisher, 122 Mich. 43, 80 N.W. 1004 (1899); Pomeroy v. Westfield, 154 Mass. 462, 28 N.E. 899 (1891); Ward v. Thompson, 57 Wash. 2d 655, 359 P. 2d 143 (1961); Zimmer v. California Co., 174 F. Supp. 757 (D.C. Mont. 1959). [Assumption of risk is a form of contributory negligence. Contributory negligence and assumption of risk may co-exist but are not synonymous terms.] Nodland v. Krentzer and Wasem, 184 Iowa 476, 168 N.W. 889 (1918).

[7] 65A C.J.S. Negligence § 174 (1966), 38 *Am. Jur.* Negligence § 173 (1941) and 4 Words and Phrases 622 (1969).

[8] Hansen v. Minneapolis, 261 Minn. 568, 113 N.W. 2d 508 (1962). One dissenting judge said that the plaintiff assumed the risk as a matter of law. See Keeton, Assumption of Risk and the Landowner, 22 La. L. Rev. 108 (1961).

[9] Plaintiff slipped on wet concrete and the court denied liability holding that one who voluntarily enters into a situation involving an obvious and known danger impliedly assumes the risk of injury. Fowler v. Liquid Carbonic Corp., 121 S. 2d 49 (Fla. 1960), Keeton, Personal Injuries Resulting from Open and Obvious Conditions, 100 Pa. L. Rev. 629 (1952), Bohlen, Voluntary Assumption of Risk, 20 Harv. L. Rev. 14 (1906).

[10] Knudsen v. Merle Hay Plaza, Inc., 160 N.W. 2d 279 (Iowa, 1968); Restatement of Torts 2d § 343a (1966); Corkery v. Greenberg, 253 Iowa 846, 114 N.W. 2d 327 (1962).

obscured his vision. Plaintiff did not assume the risk, when he was going quickly to rescue the falling ladies. The court reasoned that a possessor should know that an invitee would not anticipate or guard against an open and obvious condition in using premises and is liable for failure to warn. The court awarded a judgment of $37,737.75 (life expectancy 20 years). The plaintiff, a right handed painter, suffered 84% disability in his right shoulder.

The modern trend is to hold that the occupiers duty to an invitee is not necessarily discharged by giving warning of a dangerous condition but must also extend to doing more; removing the danger or preventing invitee access to even open or obvious danger areas.[11] In many jurisdictions assumption of risk is a good defense only in master-servant cases or where there has been express contractual assumption.[12]

Modern Trend: Reasonable Probability Circumstantial Evidence, Proprietor's Own Acts Notice: Either Actual or Constructive

Generally the liability of a proprietor in failing to render the premises reasonably safe, or failing to warn invitees of existing dangers, must be predicated upon the proprietor's superior knowledge concerning the danger. With respect to the necessity of evidence concerning notice of the dangerous floor condition there are two rules of fundamental significance:

> 1. Where the floor condition is one which is traceable to the proprietor's own act, that is, a condition created by him or under his authority or is a condition in connection with which the proprietor is shown to have taken action, no proof of notice is ever necessary.[13]
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> 2. Where it appears that a floor in a store or similar place of business has been made dangerous by litter or debris present thereon, and that the presence of the litter or debris is traceable to persons for whom the proprietor is not responsible. Proof that the proprietor was negligent in relation to the floor condition requires a showing that he had actual notice thereof; or that the condition existed for such a length of time that, in the exercise of reasonable care, he should have known of it.[14]

In both types of cases, negligence of the defendant and notice to him may be found from circumstantial evidence of adequate probative value.

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[11] Marguardt v. Orlowski, 18 Ill. App. 2d 135, 151 N.E. 2d 109 (1958). Also, Peterson v. W. T. Raleigh Co., 274 Minn. 495, 144 N.W. 2d 555 (1966); Taylor v. Centennial Bowl, Inc., 65 Cal. 2d 114, 416 P. 2d 793 (1966).

[12] Parker v. Redden, 421 S.W. 2d 586 (Ky. 1967).

[13] "Thus; it has been said that matters as to notice, including questions as to the length of time the dangerous condition existed are all eliminated where it appears that the condition was created by defendant or persons for whose conduct he is responsible." Annot., 61 A.L.R. 2d 24 (1958).

[14] Annot., 61 A.L.R. 2d 11, 26 (1958); Restatement of Torts 2d § 348 (1966); 38 Am. Jur. Negligence § 136 (1941); 65 C.J.S. Negligence §§ 45, 51 (1966).

Plaintiff may prove circumstances from which the jury might reasonably conclude that the condition of the floor was one which was traceable to the proprietor's own act or omission, in which case no proof of notice is necessary. Further, circumstantial evidence of adequate probative value may establish that the floor condition, traceable to third parties, was one which the proprietor either had actual notice or the condition existed for such a length of time, that in the exercise of reasonable care he should have known of it.[15]

An exceptionally well reasoned case[16] gives a good application of both theories. Plaintiff, 84 years of age, but in excellent health, walked into a supermarket to purchase some rice. While looking for rice she stepped on some vermicelli, slipped, fell and broke her right leg near the hip joint. There was a damaged package of vermicelli still on the shelf and about one fourth of its contents on the floor in the aisle near where she fell and toward the check out counter.

The floor condition was one, which was traceable to the proprietor's own act. From the evidence, the jury could infer that the damaged package of vermicelli was cut by the case-opening knife, when the original container was opened and was placed on the shelf in that condition.[17]

The other theory properly submitted to the jury was that of constructive notice. The jury had the right to conclude that the vermicelli was on the floor at the time the manager was checking the stock in the aisle five minutes before the fall, and the damaged package was either on the shelf or floor at the time; that in the exercise of reasonable diligence the manager should have seen it, recognized the danger it presented and should have removed it.[18]

Moreover, the cashier, said that before she heard the fall, some children walked to the check stand with loose vermicelli in their hands. The jury could have concluded that in the exercise of reasonable care and in accordance with the requirement of the employees to give notice of foreign substances on the floor, the cashier was negligent in not investigating further the source of the vermicelli and determine whether any more of it was on the floor, and in not notifying other employees of these facts. The jury could have concluded that the children had picked up some vermicelli and gone out the front door before the manager went into the aisle.[19]

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[15] "Negligence, like any other fact, may be proved by circumstantial evidence. This is evidence of a fact, or a set of facts, from which the existence of another fact may reasonably be inferred. It involves, in addition to the assertion of witnesses as to what they have observed, a process of reasoning, or inference, by which a conclusion is drawn." Prosser, Law of Torts 216 (1964).

[16] Mississippi Winn-Dixie Supermarket v. Huges, 156 S. 2d 734 (Miss. 1963).

[17] *Id.* at 737.

[18] *Id.* at 737, 738.

[19] *Id.* at 738.

Nor can we say that the damages were grossly excessive or evidenced bias, passion or prejudice. Mrs. Hughes was 84 years of age, and in good health. Since the accident she incurred medical expenses of almost $10,000.00. Since the condition of her fractured leg made it impossible for her to care for herself, she had to employ "sitters" or practical nurses around the clock, at $15.00 each 24 hours. She received a permanent injury and, will probably never walk again, without the use of a walker. A six inch nail was driven into the fractured bone by a surgeon, the bone has shortened and the nail progressed through the head of the bone into the joint. This protrusion caused her constant pain, even when moving her leg in bed. She has experienced considerable pain and suffering since the fall. Her regular physician testified that because of the forced inactivity resulting from the fall, there had been an acceleration of arteriosclerosis and high blood pressure thus affecting to some extent her mental status. We cannot say that the damages awarded of $40,000 were grossly excessive.[20]

Courts have been searching for any facts that might serve as constructive notice to defendants. The banana peel was dark and looked old, the bean was stepped on and mashed, the grapes were trampled. These facts have given juries an opportunity to find for plaintiffs on the theory that the groceryman-defendant had constructive notice. Where plaintiff slipped on leaves that had ice under them and there had been no precipitation locally for five days preceding the accident, plaintiff recovered because the jury found the defendant was put on constructive notice of the danger.[21]

A Mississippi court held that where a plaintiff showed that circumstances were such as to create a reasonable probability that the dangerous condition would occur, because it had been raining all day, the customer was not required to prove that the proprietor of the store had either actual or constructive notice of these specific conditions, in this instance a specific puddle of water.[22]

Modern Trends: More Adequate Awards

The modern rule holds that where the plaintiff shows that circumstances were such as to create a reasonable probability that the dangerous condition would occur he does not have to prove either actual or

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[20] *Id.*

[21] Williams v. Schultz, 429 Pa. 429, 240 A. 2d 812 (1968). See also Parker v. Redden, 421 S.W. 2d 586 (Ky. 1967).

[22] F. W. Woolworth Co. v. Stokes, 191 S. 2d 411 (Miss. 1966). Two earlier cases relied on by the defendants were overruled: Sears, Roebuck & Co. v. Tisdale, 185 S. 2d 916 (Miss. 1966) and Mississippi Winn-Dixie Supermarket Inc. v. Huges, 156 S. 2d 734 (Miss. 1963).

constructive notice.[23] Four recent cases will illustrate this modern trend.

A customer slipped and fell in defendant's supermarket on a lettuce leaf and was awarded $20,000.00. A witness, who was following the customer in the store at the time of the accident, testified that several fragments of brown, wilted lettuce were found on the floor in the vicinity of the accident and some adhering to plaintiff's shoes. These facts raised submissible issue to the jury; who could infer that it had been on the floor for several hours and had been subjected to customer's traffic for a long period of time. Chief Judge Hastie noted:

> "This liberal concept of the circumstances in which the court should leave decisions to the jury parallels the continuing concern of the courts of the United States that in the federal forum the constitutional rights to jury trial not be eroded by judicial intrusions; upon the province of the jury, especially where as in this case, intelligent choice among permissible inferences from the evidence lies within the area of normal lay competence." [24]

A shopper with her 13 year old daughter fell forward to the main floor as she started down the stairway, when her foot became stuck on some "sticky substance" on the steps.[25] Both parties agreed that the gum which caused the injuries was thrown on the stairs by another customer, not by an employee, plaintiff conceded that defendant had no actual knowledge of its presence nor could she establish that this particular substance had been there long enough that constructive knowledge of its presence could be imputed to the store. However, the manager admitted on cross-examination that the store was cleaned only once a day and that photos of the stairs taken two weeks after the accident showed that spots of gum were representative of the usual condition. Plaintiff's instruction to the jury:

> "Even though the condition was temporary; if the condition was a recurring one, and the personnel of the establishment had knowledge of the fact that the condition recurred from time to time, then you are permitted to infer that the existence of the condition itself was negligence." [26]

The jury found for plaintiff and awarded $12,840.00 for physical disablement, pain and suffering and $7,500.00 for her husband for loss of his wife's services and companionship.

On appeal the New Mexico Supreme Court held:

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[23] Shiflett v. Timberlake, Inc., 205 Va. 406, 137 S.E. 2d 908 (1964); Bozza v. Vornado, Inc., 42 N.J. 355, 200 A. 2d 777 (1964); Jacobsen v. Yohens, Inc., 186 A. 2d 148 (N.H. 1962); Torda v. Grand Union Co., 59 N.J. Super. 41, 157 A. 2d 133 (1959); F. W. Woolworth Co. v. Bland, 208 S.W. 2d 263 (Mo. 1948); Flora v. Great Atlantic & Pacific Tea Co., 198 A. 663 (Pa. 1938); Lyle v. Megerle, 270 Ky. 227, 109 S.W. 2d 598 (1937).

[24] Ramsey v. Great Atlantic & Pacific Tea Co., 408 F. 2d 89 (3rd Cir. 1969).

[25] Maloney v. J. C. Penny Co., 71 N.M. 244, 377 P. 2d 663 (1963).

[26] *Id.*

(1) What constitutes due care of an invitee is always to be determined by circumstances and conditions surrounding the transaction under consideration—

(2) In the event of a careless general practice, specific notice to the defendant is unnecessary.

(3) Where the dangerous condition is not an isolated one but is foreseeable because part of a pattern of conduct, a recurring incident, a general condition, or a continuing condition, then we hold that the rule most conducive to justice is that, absent a showing of due care, Plaintiff need not prove Defendant had actual or constructive knowledge of the specific item forming part of the pattern of conduct, recurring incident, etc.

(4) If the fact-finder can find a lack of due care and determine that Defendant should reasonably have foreseen that his negligence could combine with that of a third party then in such event it is no longer necessary for a Plaintiff to prove how long the specific piece of gum food etc. forming part of the general condition was present; constructive knowledge may be presumed from the prior recurring conditions.

(5) This rule applies in the instant case and Plaintiff had a right to go to the jury even though she could not prove how long the particular piece of gum had been on the stairs.[27]

Another plaintiff slipped and fell in a cafeteria portion of a store, testified that she noticed a chocolate colored substance "sticky and slimy", 3 or 4 inches in length on the floor.[28] This was a self-service type facility, no lids on beverage containers, trays were not required in carrying food to nearby tables. The N. J. court held constructive notice was not required where general circumstances, including littered condition of premises created a reasonable probability that a dangerous condition would occur.[29]

Defendant's motion to dismiss had been sustained by the lower court but the New Jersey Supreme Court held:

(1) Generally, a proprietor's duty to his invitee is one of due care under all the circumstances.

(2) Where invitees have been injured by a dangerous condition on the premises of a proprietor, our cases have stressed the proposition that the proprietor is liable for injuries to an invitee if he actually knew of the dangerous condition or if the condition had existed for such a length of time that he should have known of its presence.

(3) "We feel that the concept of actual or constructive notice has been given undue emphasis in our decisions."

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[27] *Id.*

[28] **Bozza v. Vornado, Inc., 42 N.J. 355, 200 A. 2d 777 (1964).**

[29] *Id.*

(4) Notice is merely one factor for determining whether the defendant has breached his duty of care.

(5) "When plaintiff has shown that the circumstances were such as to create the reasonable probability that the dangerous condition would occur, he need not also prove actual or constructive notice of the specific condition."

(6) Factors bearing on the existence of such reasonable probability would include the nature of the business, the general condition of the premises, a pattern of conduct or recurring incidents.

(7) To relieve the plaintiff of the requirement of proving actual or constructive notice in such instances is to effect a more equitable balance in regard to the burden of proof.

(8) Once plaintiff introduces evidence which raises an inference of negligence, defendant may then negate the inference by submitting evidence of due care. It could not be said that this rule makes the proprietor an insurer.

(9) "We hold that the testimony of plaintiff as to the nature of defendants' business and the general condition of defendants' premises would permit a jury to infer negligence on the part of defendants so that defendants would be required to produce proof of performance of their duty of due care commensurate with the kind and nature of their business."

(10) Therefore, we deem it unnecessary to decide whether the facts in the instant case would permit an inference of constructive notice on the part of defendants.

(11) Absent an explanation by defendants, a jury could find from the condition of the premises and the nature of the business ('very busy' self-service cafeteria, with littered floors, supplied no lids on beverage containers, and did not require the use of trays) that defendants were guilty of causal negligence in operating the cafeteria. Comment: Justice Schettino said we have a neat, nuanced, and highly knowledgeable account of the basis of an occupier's liability to his invitees for harm from dangerous condition of the premises.[30]

The instant case is instructive in bringing out the breadth of the duty owed by the occupier to his invitees or business visitors. It is a duty of due care under all the circumstances. It follows that the occupier must use due care not to injure his invitee by negligent activity and must warn him of latent perils actually known to the occupier. Moreover, it is hornbook law that the occupier is under an affirmative duty to inspect his premises and to discover dangerous conditions. It is essential, however, as underscored in Bozza, that the duty of reasonable inspection is only part of the larger, paramount and inclusive duty of reasonable care to make the premises reasonably safe.

In a conventional slip-and-fall case, plaintiff may show he slipped on French fried potatoes on defendant's cafeteria floor. A jury would

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[30] *Id.* at 780-781.

probably be allowed to find that such potatoes constituted a defective condition. But is it possible that the potatoes got onto the floor consistent with due care on the occupier's part: another patron may have dropped them a minute before the accident. To close the gap in his *prima facie* case and to get over the jury rail, plaintiff must offer additional proof. Normally he does so by showing either (1) that defendant (his employees) created the condition by negligent conduct, *i.e.*, an employee dropped the potatoes or (2) defendant failed to discover and remove the defect although there was a reasonable opportunity to do both. The basis for a permissible inference as to the second category of proof is established by proving that the defect was reasonably discoverable (e.g., cord left in aisle, banana peel on store floor) and had existed long enough to have been discovered and removed by obeying the standard of conduct which the jury is permitted to establish and apply to the case. It is here that plaintiff's strain and strive to prove the two elements of constructive notice (discoverable nature of defect and its existence for a long enough time) by showing that the foreign object was there for a considerable length of time.[31]

In another well reasoned case,[32] we find that a plaintiff entered a self-service supermarket. The produce department was described as a long row of refrigeration racks on top of each was found a slanted rack, which angled toward the aisle, the front of which was encased by glass and on which fruit and vegetables were chilled. Plaintiff while selecting peaches and walking to the scales slipped and fell on broken and slimy leaves about a foot from the slanted racks. There were leaves protruding from the glass enclosures. The New Jersey Supreme Court overruled the lower court, who dismissed the case and held:

> Once Plaintiff introduces evidence which raises an inference of negligence, defendant may then negate the inference by submitting evidence of due care. Thus it would not be said that this rule does make the proprietor an insurer.[33]

Therefore, where the plaintiff raises an inference of negligence defendant may then negate the inference by submitting evidence of due care.[34] One court imposed an affirmative duty on a cafeteria owner to

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[31] *Id.*

[32] Mangeri v. Great Atlantic & Pacific Tea Co., 357 F. 2d 202 (3rd Cir. 1966); Simpson v. Duffy, 19 N.J. Super. 339, 88 A. 2d 520 (1952); Torda v. Grand Union Co., 59 N.J. Super. 41, 157 A. 2d 133 (1959); Thompson v. Giant Tiger Corp., 118 N.J.C. 13, 189 A. 649 (1937).

[33] Simpson, *supra* n. 32 at 522.

[34] *Supra* n. 28. For cases dealing with supermarkets and department stores see F. W. Woolworth Co. v. Stokes, 191 S. 2d 411 (Miss. 1966); Sharp v. J. C. Penney Co., 361 F. 2d 722 (6th Cir. 1966); Wollerman v. Grand Union Stores, Inc., 47 N.J. 426, 221 A. 2d 513 (1966); Kimbrell v. Bi-Lo, Inc., 248 S.C. 365, 150 S.E. 2d 79 (1966); Rhodes v. El Rancho Markets, 4 Ariz. App. 183, 418 P. 2d 613 (1966); Note, 46 B.U.L. Rev. 231 (1966).

guard against french fried potatoes on which plaintiff slipped, where circumstances were such as to create reasonable probability that such dangerous conditions would occur.[35]

A Mississippi court seemed reluctant to allow a large verdict to stand[36] where plaintiff's total expense was $282.14 as a result of a fall in defendant's store. She suffered a bruised right knee the resulting judgment of $10,500.00 was held to be grossly excessive. The Instruction that the jury could consider decreased purchasing power of a dollar and could add an additional sum to the verdict in order to compensate plaintiff for her damages, if any, for such decreasing purchasing power was reversible error in that it was calculated to encourage the jury to increase damages because of matters aliunde to record.

The Fifth Circuit in an action under the Jones Act held there was no error in charging the jury on a decrease in purchasing power of the dollar or in refusing defendant's request for instruction that damage, if any, would not be subject to Federal Income Tax.[37]

In a recent case[38] we find a plaintiff shopping in a produce section of defendant's grocery store. She slipped and fell on a piece of brown and decayed banana, without peeling, which was on the floor. She also noticed a piece of lettuce on the floor a little way off. She fell "hard up" against a counter, striking her back and the tip of her spine, and knocking loose a cervical collar she wore as a result of an earlier automobile accident. The fall injured plaintiff's back and aggravated her old neck injury, resulting in permanent disability. The Vermont Supreme Court affirmed the $35,000.00 judgment holding that defendant's use of self-service methods of displaying fruits and vegetables placed on the store operator, the need for greater vigilance to meet the Standard of care required under the circumstances. Further, it placed on the store the duty to use reasonable measures to discover and remove debris which may have been dropped on the floor by others. Debris on the floor is foreseeable in self-service operations, and such hazard to business invitees constitutes risk of harm within reasonable foresight of the defendant which he must take reasonable steps to obviate. The defendant in this case presented no evidence of any precautions the store management took to see that no hazard was created, no inspection routine was shown, no sweeping or cleaning of the floor and the jury reasonably concluded that the defendant did less than its duty required to protect the plaintiff from the risk of injury created by fallen debris. This case confirms the

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[35] Schwartz v. Warwick, Philadelphia Corp., 424 Pa. 185, 226 A. 2d 484 (1967).

[36] West Bros. of Pascagoula v. Dickens, 254 Miss. 869, 183 S. 2d 480 (1966).

[37] Cunningham v. Bay Drilling Co., 421 F. 2d 1398 (5th Cir. 1970). See Annot., 63 A.L.R. 2d 1394 (1959), Annot., 12 A.L.R. 2d 6 (1950).

[38] Forcier v. Grand Union Stores, Inc., 264 A. 2d 796 (Vt. 1970). See Thompson v. Green Mountain Power Corp., 120 Vt. 478, 144 A. 2d 786 (1958).

rule that voluntary ignorance may constitute negligence, if the detection of danger can be accomplished by reasonable vigilance.

In another well reasoned case Chief Justice Weintraub held:

> We are satisfied that where a substantial risk or injury is implicit in the manner in which the business is conducted and on the total scene it is fairly probable that the operator is responsible either in creating the hazard or permitting it to arise or to continue, it would be unjust to saddle the plaintiff with the burden of isolating the precise failure. The situation being peculiarly in the defendant's hands, it is fair to call upon the defendant to explain, if he wishes to avoid an inference by the trier of facts that the fault probably was his.[39]

A $4,000.00 award for lumbo-sacral strain which caused considerable pain and discomfort while plaintiff was being treated over an extended period of time, which discomfort existed at the time of the trial some 13 months after the accident was not abuse of discretion. This is a typical case of slip and fall and the doctor's testimony is set out in the footnotes.[40]

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[39] Wollerman v. Grand Union Stores, Inc., 47 N.J. 426, 221 A. 2d 513 (1966); Rumsey v. Great Atlantic & Pacific Tea Co., 408 F. 2d 89 (3rd Cir. 1969).

[40] Guthrie v. Winn-Dixie Louisiana, 238 S. 2d 390 (La. App. 1970).
The testimony of Dr. Shirley was recorded as:

> "At the time I saw her October 7, 1968, she gave me a history that she had slipped while at Winn-Dixie and she fell hurting her right side and her right hip, lower back and face. On examination I found that she had some bruises on the right shoulder and the hip was rather tender, and she had a spot on her right temple with some bruises on the right temple. X-rays were taken of these areas at the time and there were no fractures found."
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> "I felt like the treatment should be ultrasound, diathermy, analgesic drugs and she was followed for sometime with this type treatment, and then on October 21, we re-evaluated the case trying to see how we stood with the treatment. Reflexes were all normal, so we were a little bit worried about a ruptured disc. She was having some pain in the sciatic nerve and in the hip, but the reflexes were all normal and the Kernig's was negative at that time. We felt like it was probably just still from the injury itself from the fall. Then in January when I saw her again—she had some diathermy a couple more times in October. Then we didn't see her again until January. She came in January 22 then was examined at that time and found to have some low back pain in the sacral area and up to the third lumbar. She was given a camp brace at this time, a brace for the lower back, and given some muscle relaxant drugs, some exercises such as probably most orthopedists and most general practitioners recommend these flexion exercises for lower back strain. She appeared to have chronic low back strain at this time. And she was also asked to continue the diathermy. She came several times then, but then was not seen again and a report was sent in in March to the insurance company on her because we hadn't seen her, and we weren't sure what the circumstances were, so we just sent a note that she must be well because we hadn't seen her. But then we saw her again in May with complaints again of the low back and was placed on diathermy some more, flexion exercises at that time. This I might add was a result of Dr. Morin's letter to me and the fact that she was still complaining. He had sent her back to me for the treatment."

See also Dr. Norman P. Morin's testimony. He testified:

> "Lumbosacral strains can be quite painful and can be quite disabling. Most people use the term 'just a pulled muscle.' Well, a pulled muscle can be, as I

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The x-rays were negative in this case so all we have is the proof of soft tissue injury,[41] which was first called a "Railroad Back" and which could only be cured by the application of "Greenback Poltus." With the coming of the automobile the "whiplash" injuries developed usually resulting from a rearend collision.[42] With such a history it is no wonder that where you only have a cervical sprain the juries are reluctant to award an adequate verdict. These injuries are real and it is all a matter of proof in preparing the case for the jury.[43] The same old argument can be heard in many modern air-conditioned court rooms today. It would be transcribed something like this:

> Damages are not measured by what you take away but what you leave. For example, if you take away $100,000.00 from this great corporation's last year's profits of $11,891,783.00 it hasn't been injured because they have over ten million profits left. What you took away would be like taking a bullfrog out of the Pacific Ocean. But when you take away this Plaintiff's strong back, and he has only one back, you leave him with nothing. The doctor tells you that Mr. _____ now has a weak, aching back, he has nothing. How do you arrive at a figure for each of his elements of damages? Well, his special damages are: . . . .

Examples of Increasing Awards

We have seen that the early judgments have been low in slip and fall cases. The courts seemed skeptical of the injuries received in this type litigation. Then the supermarkets appeared with adequate parking

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have just stated, very painful sufficiently to keep a patient in bed for several days or even weeks."

"We usually classify an injury such as a pulled muscle in the low back or in the neck as mild if there is recovery within six months. This individual injured herself, as I have stated, on October 5, 1968, and I saw her the first time on May 9 and the second time on July 21. She, on those two visits, still exhibited evidence of residual muscle spasm and painful motion and tenderness in the low back. Therefore, this would classify her within the range of a moderately severe injury to the muscles of the low back."

See Hay v. Sears, Roebuck & Co., 224 S. 2d 496 (La. 1969).

[41] H. Glaser, Proof of Soft Tissue Injury, H 4-2836, Course Handbook Series #18, (Practicing Law Institute 1969).

[42] *Id.* Witherspoon, Presentation of Evidence in a Whiplash or Cervical Sprain Case, 15 Clev.-Mar. L. Rev. 424 (1966).

[43] "Preparation and Treatment of a Neck and Back Sprain Case," by Stanley E. Preiser, Trial Lawyers Service Company, Belleville, Illinois. "Low Back Pain Syndrome," by Rene Cailbet, M.D. (2d ed., F. A. Davis Company, Philadelphia); also "Neck and Arm Pain," by the same author and available through the same publisher. "Preparation for Trial of Civil Action," by Eustance Cullinan (American Law Institute, Philadelphia, Pa.), "Diagnosis of Low R. Calliet Back Pain," etc., Law Med. J., 199 (Nov. 1968). Hatchins, Hale, "Damages: Trial Demonstrations & Lectures," Institute of Continuing Education (Ann Arbor, Michigan), "The Neck" 2 volumes, and "The Low Back" 1 volume. Courtroom Medicine, with looseleaf cumulative supplement—(Matthew Bender & Co., Inc., N.Y.).

lots. Now gigantic malls, air conditioned and heated are the vogue. The amounts of the verdicts have soared in this type case.

In Ohio in 1937 a judgment for $4,000.00[44] was affirmed, for a plaintiff, who fell on a store floor and alleged oily substance was the cause. Her heel marks appeared on the floor and her hands and clothing were sticky from the oily substance.

Ten years later in 1947, a judgment for $7,300.00[45] was affirmed in the same state, the court holding that plaintiff's contributory negligence is strictly a jury question and that a customer is not required to make a critical examination of the aisles of the store where she walked but could assume that all aisles were reasonably safe. The injuries, as determined from the record, were somewhat similar.

Then in 1957 a judgment for $60,000.00[46] was affirmed where plaintiff slipped and fell on ice and snow on a traveled incline injuring his right knee. The proof showed he was 29 years of age, had a life expectancy of 35 years and his income for 1953 was $7,564.64. An orthopedic specialist testified that plaintiff suffered a torn seminar cartilage, a ruptured ligament, ostioporsis in the knee joint and 35 to 50% permanent-partial disability. The doctor testified further:

> "It is conjectural as to whether or not this Plaintiff will go back to a point in which he will be able to carry out the various types of physical activities which have been described without a certain degree or element of hazard to him. The injury to his knee joint in 1940 was completely healed and did not play any part in his present condition."

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[44] In Carson v. S. H. Kress & Co., 56 Ohio App. 178, 10 N.E. 2d 180 (1937), $4,000 judgment for customer who fell on store floor and testimony it was slippery, due to recent application of oily substance, that her heel marks appeared on the floor and her hand and clothing were sticky with oily substance.

[45] As early as 1947 the courts were submitting questions of plaintiff's contributory negligence to juries and held a customer not required to make a critical examination of the aisles of the store where she walked but could assume that they were reasonably safe and such assumption must be taken into consideration in determining whether customer was contributory negligent. S. S. Kresge Co. vs. Holland, 158 F. 2d 495 (6th Cir.); citing with approval: J. C. Penny vs. Robinson, 128 Ohio St. 626, 193 N.E. 401 (1934); 100 A.L.R. 705; Carson vs. S. H. Kress & Co., 58 Ohio App. 178, 10 N.E. 2d 180 (1937); F. W. Woolworth vs. Bland, 22 Ohio L. A. 660; Fox v. Ben Schlechler & Co., 57 Ohio App. 275, 13 N.E. 2d 730 (1937); and Beckley vs. Sears, Roebuck & Co., 62 Ohio App. 180, 23 N.E. 2d 505 (1938).

[46] Chesapeake & Ohio Ry. Co. vs. Zernie Newman, Jr. (1957), 243 F. 2d 804 (1957); plaintiff slipped and fell on ice & snow on a traveled incline, injured his right knee. He was 29 years of age, had a life expectancy of 35 years. His income in 1953 was $7,564.65. An orthopedic specialist testified that Plaintiff had a torn semilinar cartilage, a ruptured ligament, osteoporosis in the knee joint and 35 to 50% permanent-partial disability. The doctor testified:

"It is conjectural as to whether or not this Plaintiff will go back to a point in which he will be able to carry out the various types or things, physical activities, which have been described, without a certain element of hazard to him. Also that an earlier fracture above the knee joint in 1940 played no part in this present condition." Award $60,000.00, citing with approval 32 C.J.S. Evidence, Par. 585, p. 439; 20 Am. Jur., Evidence, 284 §§ 305, 306

Conclusion

There are two other very interesting cases which have just been reported that show how far the courts go in holding there was no contributory negligence.

In the first case[47] the blind plaintiff was a door to door salesman and who stepped into a floorless area when he entered the defendant's premises. The court held he was a business visitor even though the premises, at the time were not being operated as a store, but were undergoing remodeling. The failure of the blind man to use his cane when he had previously done business on the defendant's premises was not contributory negligence. The jury awarded this blind peddler $38,000.00. In a second case,[48] the defendant was an owner of a large mall. A staircase which started at the upper level, was circular, wound around over a pool in which there was a water fountain and ultimately ended at the lower level of the mall. The pool, over which the circular stairway was constructed, is a large one in which there were rocks, plants and a number of water fountains arranged in order to spray water upwards in a manner pleasing to the eye, thus making the shopping area more attractive æsthetically. The plaintiff was a 65 year old woman who was retired on social security, who worked on the upper floor for Franklin Simon. She arrived at work about 8:50 and was going down to the first floor to have her shoe repaired, which she carried in a tote bag in her right hand. There were only two ways to reach the lower floor, an escalator, which was not running, and the circular stairs. She descended holding on to the railing with her left hand. She did not observe anything wet on the steps, but when she reached the second or third step from the bottom, her heel slipped on something wet and slippery and she was thrown with great force forward and had to let go of the banister. As she lay on the landing at the bottom of the steps she turned her head to see what she fell on and saw that the steps were wet. Her coat and stockings were wet and the fountain was operating "going on high". The plaintiff suffered a fractured hip and underwent an oper-

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[47] James Argo vs. Sidney Goodstein, 265 A. 2d 783 (Pa. 1970). Vendor who enters premises and transacts business with proprietor is business visitor. When the plaintiff, a blind door to door salesman, entered defendant's premises and stepped into floorless area, he was business visitor, even though premises at the time were not being operated as store but were undergoing remodeling. The failure of the blind man to use his cane when he had previously done business on defendant's premises was not contributory negligence. Jury verdict $38,000.00, citing with approval: Kimble vs. Mackinstosh Hemphill Co., 359 Pa. 461, 59 A. 2d 68 (1948); Restatement of Torts 2d § 332; Straight vs. B. F. Goodrich Co., 354 Pa. 391, 47 A. 2d 605 (1946); Hamilton vs. Han, 422 Pa. 373, 221 A. 2d 309 (1966).

[48] Mondawmin v. Kres, 258 Md. 307, 266 A. 2d 8 (1970). Sixty-five-year old woman descending stairs sustained injuries in an enclosed shopping center when she fell on terrazzo steps allegedly rendered wet because of spray from nearby fountain; all issues including contributory negligence were for jury. Only when minds of reasonable persons cannot differ is a trial court justified in deciding question of contributory negligence as a matter of law.

ation to insert a pin in the fractured hip and another operation later to remove the pin. There was a long period of treatment and convalescence in both the hospital and nursing home. The jury awarded her $25,000.00. The defendant on appeal contended:

(1) There was no legally sufficient evidence that the defendant was guilty of primary negligence; (2) the plaintiff was guilty of contributory negligence as a matter of law; (3) the trial court erred in its rulings on the evidence in admitting the record of the Workmen's Compensation Commission as to any previous falls on the steps. The Maryland Supreme Court held that there was sufficient evidence of the defendant's primary negligence to go to the jury. Citing with approval "The Restatement of the Law of Torts, Second, § 343 which sets out the standards governing the relationship of landowner and business invitee with respect to a hazardous condition:

> The landowner is subject to liability for harm caused by a natural or artificial condition on his land if: (a) he knows or by the exercise of reasonable care could discover the condition, (b) he should expect that invitees will not discover the danger, or will fail to protect themselves against it, (c) he invites entry upon the land without (1) making the condition safe, or (2) giving a warning.

In the second contention the plaintiff was entitled to assume that the proprietor will exercise reasonable care to ascertain the condition of the premises, and if he discovers any unsafe condition he will either take such action as will correct the condition and make it reasonably safe or give a warning of the unsafe condition. It is only when the minds of reasonable persons cannot differ that a trial court is justified in deciding the question of contributory negligence as a matter of law, as this too is a proper question for the jury determination. On the third point the records of the workmen's compensation commission were admitted to show that on the same steps an employee was injured and she reported, "I was walking down steps when I slipped on the wet step and hurt my back and leg." The court decided that this was properly admitted to show that the owner of the mall had notice of the existence of this hazard. This is a most interesting and well reasoned case and many authorities are cited, on each of the three points raised on appeal.

The evolution of slip and fall cases into a higher awards bracket has been established if the defendant has been negligent. Modern courts are more harsh in their requirements of making the defendants prove contributory negligence on the part of the plaintiffs. It is similar to the equitable doctrine that you must come into court with clean hands.

Quantum of recovery in slip and fall cases shows an ever increasing amount of awards.